INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	2
Date of the judgment and date of the application for appeal	2
Case sustaining jurisdiction	2
Nature of the case	3
Stage in proceedings where Federal questions were raised	4
Supplemental statement as to jurisdiction	7
Appendix "A"—State statute involved	10
Appendix "B"—Facts concerning statute involved	11
Appendix "C"—Opinion of Circuit Court of Jefferson County, Kentucky	13
Appendix "D"—Opinion of the Court of Appeals of Kentucky	25

Case Cited

McCollum v. *Champaign Board of Education*, No. 90, October Term, 1947 (decided March 8, 1948)	2

Statutes Cited

Constitution of the United States, 14th Amendment	4
Kentucky Revised Statutes, Chapters 156 to 160, pages 1349 to 1399 inclusive	1, 2
United States Code, Title 28, Section 344a	1, 2, 5, 9

COURT OF APPEALS OF KENTUCKY

No. 745

JEFFERSON COUNTY BOARD OF EDUCATION, WILLIAM DIEMER, SUING AS TAXPAYER OF JEFFERSON COUNTY, *Appellants,*

vs.

JOSHUA B. EVERETT, HIS SUCCESSOR AS SUPERINTENDENT OF KENTUCKY CHILDREN'S HOME

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

To the Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Jefferson County Board of Education and William Diemer, a class taxpayer of Jefferson County, files this statement disclosing the basis upon which they invoke the jurisdiction of the Supreme Court of the United States upon this appeal to review the judgment of the Court of Appeals of Kentucky, which became final on February 13, 1948:

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is 28 U. S. C., Section 344(a) permitting appeals:

> "Where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States, and the decision is in favor of its validity."

(b) Certain chapters of the Kentucky Statutes, pertaining to schools, to-wit: Chapters 156 to 160, inclusive, pages

1349 to 1399 inclusive, of the Kentucky Revised Statutes, the validity of which is involved, have authorized and have permitted to develop a program whereby the Jefferson County Board of Education is required to levy a tax upon its constituency as hereinafter set out in (d), with respect to which program the Court of Appeals of Kentucky held as follows:

> "We do not think the program of education which the Legislature has authorized or has permitted to develop for the children in the Home runs afoul of either the Federal or State Constitution."

(c) That the date of the judgment sought to be reviewed is February 13, 1948, and the date on which the application for appeal is presented in this 26th day of March, 1948.

(d) The recent Supreme Court case believed to sustain the jurisdiction of the Supreme Court in this cause is as follows:

In *Vashti McCollum* v. *Champaign Board of Education* (March 8, 1948), — U. S. —, —L. Ed. —, the Supreme Court of the United States accepted jurisdiction on an appeal brought under 28 U.S.C. Section 344(a). Motion to dismiss the appeal was made upon the ground that the judgment of the State Supreme Court of Illinois does not draw in question the "validity of a statute of any State" as required by the above section, since no specific statute was designated as being invalid. The Supreme Court in denying this motion stated:

> "This contention rests on the admitted fact that the challenged program of religious instruction was not expressly authorized by statute.
>
> "But the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the board authority to establish such a program. This holding is sufficient to show that the

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validity of an Illinois Statute was drawn in question within the meaning of 28 U. S. C. Section 344(a). Hamilton v. Regents of University of California, 293 U. S. 245, 258."

(e) That the nature of this case is an appeal from a judgment of the Kentucky Court of Appeals, wherein the court held that the Kentucky Statutes, pertaining to schools, were such as to give sanction to compel the Jefferson County Board of Education to solely and exclusively levy school taxes on rural Jefferson County, composed of only 2.3% of the State's population, for the purpose of bearing the expense of constructing school buildings and equipment and maintaining same, and furnishing teachers for over 200 dependent children, of both sexes and races, temporarily committed by court orders to a Kentucky State Institution, the Kentucky Children's Home, from the County Courts of the other 119 Counties of the State, from where the dependent children are exclusively sent to the State Home, thereby relieving the remaining 97.7% of the State's population from any tax burden whatever relative to said schools and schooling, maintained exclusively for their own dependent children, all of which constitutes an arbitrary, oppressive and capricious discrimination against 2.3% of the State's population, and in favor of the 97.7% of the State's population, and was and is a flagrant and palpable inequity between said two classes of taxpayers, inasmuch as the sole tax levying burden was imposed on the 2.3% of the State's population, and no tax levying burden whatever was imposed upon the 97.7% of the State's population, and where no benefit whatever was received from the 2.3% of the State's population, and all the benefits received accrued to the 97.7% of the State's population; that the amount at present involved in the capricious, arbitrary, and unjust discriminatory tax being placed upon the 2.3%

of the State's population is approximately $37,000.00 per year, and will amount, over a 15 year period, including school buildings, services and facilities, to over $641,000.00, which fact is not disputed.

(f) The stage in the proceedings in the court of first instance, at which the Federal questions sought to be reviewed were raised, was on pages 53, 54 and 55 of plaintiffs' petition, by pleading verbatim the 14th Amendment to the Federal Constitution, and invoking and discussing same: that the stage in which the same Federal question was sought to be reviewed, in the State Court of Appeals, was raised in the said petition, which was included in the Record in the Court of Appeals of Kentucky, and in petitioners' Brief on hearing in chief in the Court of Appeals on Pages 18 and 20, and in petitioners' Reply Brief on Page 16, and in petitioners Petition for Rehearing on Pages 3, 14, 15 and 16; that the way in which they were passed upon by the Court of Appeals of Kentucky, and the following pertinent quotation from Pages 5 and 6 of said opinion, dated April 29, 1947, shows that the said question was presented to, considered and decided by the Court of Appeals of Kentucky, which quotation reads as follows:

> "For reasons hereinafter set forth we deem it unnecessary to discuss the Federal and State constitutional questions raised by the appellants, because we do not think the program of education which the Legislature has authorized or has permitted to develop for the children in the Home runs afoul of either the Federal or State Constitutions."

The Appellate Court in its opinion cited no authority for its decision denying the application of the 14th Amendment in appellants' favor in this case.

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It is, therefore, respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under 28 U. S. C. Section 344(a), as amended.

(S.) HENRY M. JOHNSON and
LUCIAN L. JOHNSON,
Attorneys for Appellants.

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COURT OF APPEALS OF KENTUCKY

No. 745

JEFFERSON COUNTY BOARD OF EDUCATION, WILLIAM DIEMER, SUING AS TAXPAYER OF JEFFERSON COUNTY
Appellants

v.

LUTHER E. GOHEEN, SUPERINTENDENT OF KENTUCKY CHILDREN'S HOME
AND
JOSHUA B. EVERETT, HIS SUCCESSOR AS SUPERINTENDENT OF KENTUCKY CHILDREN'S HOME

SUPPLEMENTAL STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

To the Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Jefferson County Board of Education and William Diemer, a class taxpayer of Jefferson County, file this supplemental statement disclosing additional basis upon which they invoke the jurisdiction of the Supreme Court of the United States upon this appeal to review the judgment of the Court of Appeals of Kentucky, which became final on February 13, 1948.

The Kentucky Court of Appeals, in rendering their opinion herein requiring that the population of Rural Jefferson County (2.3% of the State's population) should be taxed for the furnishing of school services for dependent children, committed to the State, as wards of the State, by the County Courts of 119 Kentucky Counties, other than

Jefferson County, which children are sent to Kentucky Children's Home, located in Jefferson County, stated:

> "At the outset, we may say it is our view that the Legislature should give *immediate consideration* to the development of an adequate program of education for the children in the Home from funds appropriated to the Department of Welfare and administered by it." • • •
>
> "We can think of no legitimate argument against the appropriation of an adequate sum of money to set up a much needed program of education which, undoubtedly, would require many special features, for children in the Home over and above the amount furnished now to the Jefferson County Board of Education in the way of per capita." • • •
>
> *"We can think of no plausible argument for requiring the Jefferson County Board of Education to assume a financial burden over and above the amount it receives in the way of per capita for educating children committed to the Home from the other 119 Counties in the State."* • • •

In response to this suggestion of the Kentucky Court of Appeals, a Bill was prepared by appellant, Jefferson County Board of Education, in order to remove this inequity and unfairness, and said Bill placed upon the State Department of Welfare the matter of providing school service for these children, and appropriating Thirty Thousand ($30,000.00) Dollars a year for the said Department of Welfare for the purpose of educating these two hundred or more children committed to this State Institution from 119 Counties of Kentucky with the sole exception of Jefferson County. The substance of the Bill was approved by the Director of the Kentucky Department of Welfare, Dr. P. Y. Lloyd, and the form of the Bill was approved by Mr. Robert K. Cullen, Chief of the Kentucky Statutes Revision Com-

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mission. The said Bill was introduced in the Kentucky Legislature in January 1948.

The facts concerning this unfair situation and the Bill to correct same were disseminated to Kentucky Legislators and other public officials in a great and extensive effort to adequately present the merits of this legislation, so that it would receive favorable consideration. Attached hereto is a copy of the proposed Bill, and a copy of the Statement of Facts concerning the inequitable conditions and the necessity and justice for passage of the Bill. However, the Legislature failed and refused to pass such Bill.

The appellants state that all the available state remedies have been exhausted in Kentucky, and thus the only possible method of eliminating this inequity is for the Supreme Court of the United States to take jurisdiction of this appeal, and consider the merits of the case.

It is, therefore, respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under § 28 U. S. C. Section 344(a) as amended, as set forth in the original Statement of basis of jurisdiction.

HENRY M. JOHNSON and
LUCIAN L. JOHNSON,
Attorneys for Appellants.

APPENDIX "A"

An Act relating to school service for, and census enumeration of, children who are inmates of state institutions; including provisions concerning distribution of the Common School Fund allocable to such children; also making appropriations for the purposes of this Act.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. For the purpose of census enumeration, and for the purpose of providing school service, children of school age who are inmates of any state institution operated by and under the control and supervision of the Department of Welfare shall not be deemed to be residents of the school district within the territorial limits of which the institution is situated, nor shall they be deemed to be residents of any other school district. It shall be the duty of the Department of Welfare to provide school service for such children, in accordance with standards fixed by the Department with the advice and assistance of the Department of Education.

§ 2. The Department of Welfare shall annually submit to the Department of Education, in accordance with regulations prescribed by the Department of Education, a census enumeration of the children of school age who are inmates of the state institutions operated by the Department of Welfare. The children so enumerated shall be counted as part of the total census enumeration of the state for the purpose of ascertaining the per capita-distribution of the Common School Fund. The Department of Education shall ascertain the amount of the Common School Fund allocable and distributable for the children so enumerated by the Department of Welfare, and, at the same times that distributions of the Common School Fund are made to school districts, shall certify to the Department of Finance the amount distributable for the children enumerated by the Department of Welfare. The Department of Finance shall then debit the Common School Fund for such amount and credit it to the account of the Department of Welfare, whereupon it shall

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be available for expenditures by the Department of Welfare for the purpose of providing school service for such children.

§ 3. Nothing in this Act is intended to affect the liability of a parent or guardian for the support of a child confined in a state institution.

§ 4. There is hereby appropriated to the Department of Welfare, out of the General Expenditure Fund in the State Treasury, the sum of $30,000 each year for the fiscal years 1948-1949 and 1949-1950, for ordinary recurring expenses involved in providing school service for children of school age in the Kentucky Children's Home at Lyndon, Kentucky; this appropriation to be in addition to any sums received by the Department of Welfare out of the Common School Fund.

APPENDIX "B"

Facts concerning a Bill to be introduced in the Legislature of Kentucky, 1948 Session, remedying a *gross injustice*, which the Kentucky Court of Appeals on April last held should be speerily righted.

The State of Kentucky of its own volition elected to locate at Lyndon, in the Rural part of Jefferson County, (that part outside of Louisville), its Kentucky Children's Home for its wards, viz. *dependent children*, who are committed in *court proceedings* from the County Courts of 119 Counties of the State (all Counties except Jefferson County, which has its own Home for dependent children at Ormsby Village, Jefferson County). This Rural Section of Jefferson County is the Jefferson County School District, which maintains its own schools for the children of the County outside of Louisville, and contains 2.3% of the total population of the State.

Rural Jefferson County population is required to be taxed for the school service of its own normal and uncommitted school children going to its County Schools (which is alright), and also for Jefferson County's dependent children,

who have been sent, thru court proceedings, to Jefferson County's own Children's Home at Ormsby Village, Jefferson County, Kentucky, which is al- right, but, under the technical law as it now standa, it is also under further obligation to furnish school services for the dependent children, committed to the State, as wards of the State, by the County Courts of the other 119 Counties. It is so manifestly unfair that this 2.3% of the State's population should be thus saddled with this latter obligation, that the Court of Appeals of Kentucky, when the matter was brought to its attention, after holding that technically the law was such that this 2.3% of the State's population in Rural Jefferson County would have to financially bear this burden, specifically called it an "*inequity,*" and in its opinion, stated as follows:

> "At the outset, we may say it is our view that the Legislature should give *immediate consideration* to the development of an adequate program of education for the children in the Home from funds appropriated to the Department of Welfare and administered by it." • • •
>
> "We can think of no legitimate argument against the appropriation of an adequate sum of money to set up a much needed program of education which, undoubtedly, would require many special features, for children in the Home over and above the amount furnished now to the Jefferson County Board of Education in the way of per capita." • • •
>
> "*We can think of no plausible argument for requiring the Jefferson County Board of Education to assume a financial burden over and above the amount it receives in the way of per capita for educating children committed to the Home from the other 119 Counties in the State.*" • • •

In order to enable the Department of Welfare to furnish this school service to its wards, as is done in connection with its delinquent children in Greendale, Fayette County, and as the State does with respect to its Blind and Deaf children in its own similar Institutions, and in order to

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remove this inequity and unfairness, from Rural Jefferson County, a Bill has been prepared and approved, placing upon the Department of Welfare the matter of *school service* for these children, and giving to the Department of Welfare the per capita allowance from the State for these children, and also appropriating $30,000.000 a year for the Department of Welfare, for the next two years, to take care of the education of these 200 and more children.

The form of the Bill, carrying out the above purpose, has been submitted to Mr. Robert K. Cullen, Reviser-Kentucky Statute Revision Commission, and he has approved the form of the Bill, so that it will not run counter to other Kentucky Statutes.

Dr. Lloyd, Director of the Department of Welfare, states that he is in complete accord with the Bill and approves same, inasmuch as the Department of Welfare would itself rather furnish school service to these children than have it done by others.

The Bill will certainly be greatly beneficial to these dependent children themselves, and will also remove an unjust and unfair burden from Rural Jefferson County, containing only 2.3% of the population of the State, and which small segment of the State's population should not carry this obligation of the whole State.

APPENDIX "C"

JEFFERSON CIRCUIT COURT, CHANCERY BRANCH, FIRST DIVISION

JEFFERSON COUNTY BOARD OF EDUCATION, WILLIAM DIEMER, Suing as Taxpayer and on Behalf of the Other Taxpayers of Jefferson County, *Plaintiffs*,

vs.

LUTHER E. GOHEEN, Superintendent of Kentucky Children's Home, *Defendant*

Opinion

This is an action brought by the Jefferson County Board of Education and William Diemer, suing as a taxpayer of

Jefferson County, against Luther E. Goheen, Superintendent of the Kentucky Children's Home, to secure an adjudication of the rights of the parties in reference to furnishing educational facilities to children of the Home.

Specifically it prays:

"That it is not the duty of the plaintiff, the Jefferson County Board of Education, to expend any of its tax funds, raised from Jefferson County, to train and educate any of the wards and public charges of the State of Kentucky, or of the other 119 counties of the State, which wards and charges are in custodia legis, or in the custody of the Court, temporarily detained in the State's Children Home Institution in Lyndon, Kentucky".

A special and general demurrer has been filed by the defendants through the Attorney General representing the Home as a state institution under the Department of Welfare.

Special Demurrer

The special demurrer attacks the right of the co-plaintiff, William Diemer, to sue either as plaintiff or co-plaintiff on the ground that no person has the right to file an action such as this unless the Board refuses to sue.

Defendant cites a number of authorities to support his contention but an examination of them reveals the fact that in all of them the governmental agency had refused to act. That is not the case here. Civil Code Section 22 provides:

> "All persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs, unless it is otherwise provided in this Code."

Certainly William Diemer, as a taxpayer residing in Jefferson County, is an interested party, as a decision in this case will naturally affect his interest as well as all other taxpayers of Jefferson County. He is not prosecuting the action alone, but is joined with the Board and is clearly permitted under the Code to join in this action. Therefore, the Special Demurrer must be and is overruled.

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General Demurrer

In the case of Wirth *v.* Board of Education for Jefferson County, decided November 26, 1935, 262 Ky. 291, which was an action filed by Dewey Wirth Jr., by his next friend, Clarence Heady, against the Board of Education for Jefferson County (same as plaintiff herein) to have declared the obligations of the County Board of Education respecting Wirth's right to attend common school while in Heady's home. Wirth, a resident of the city of Louisville, had been committed to the Louisville & Jefferson County Children's Home (Ormsby Village), an institution located in the county, and had been placed in Heady's home located in the county.

Ormsby Village maintained its own school system within its boundaries. It was contended, and this Court held, that the education of Wirth rested entirely with Ormsby Village and that the Board of Education for the City of Louisville is not responsible for tuition of Wirth; and further, in view of the fact that Ormsby Village has received a fund by way of taxation for the education of its inmates, Wirth was not entitled to attend the schools of the County Board of Education for Jefferson County, unless tuition is paid by Ormsby Village.

It will be noted in that case that the child was living in the home of Heady, which was located in the county; therefore under the jurisdiction for school purposes of the Board of Education for Jefferson County. The Court of Appeals reversed the Chancellor's finding of law in the following language:

> "The residence of Wirth while in the home of Heady is a mixed question of law and fact.
>
> We are convinced from a review of the evidence adduced, without giving weight to the chancellor's finding of facts, that the residence of Wirth, so long as he continues to remain in the home of Heady, is definitely fixed and governed by the principles stated in Board of Trustees of Stanford Graded Common School District *v.* Powell, 145 Ky. 93, 140 S. W. 67, 36 L. R. A. (N. S.) 341, Ann Cas. 1913B, 1016, and Crain *v.* Walker, 222 Ky. 828, 2 S. W. (2d) 654. They are conclusive

in the present one. And, accordingly, for common school purposes so long as he stays at Heady's home, Wirth is a resident of the common school district in which Heady resides, and he is entitled to attend, free of tuition, the common schools taught therein.

It is argued by the board of education that the statutes under which the board for Louisville and Jefferson County Children's Home was organized and now operates impose upon it the obligation to educate the children committed to its jurisdiction at its own expense, out of the funds derived from the levy and collection of taxes, under Section 938b-5, and if this contention is not correct, then a child committed to the board for Louisville and Jefferson County Children's Home, and by it placed in a 'boarding home,' so long as such child remains an inmate of the 'boarding home', is a nonresident of the school district in which the 'boarding home' is located, within the purview of section 4399-51, Kentucky Statutes Supplement 1934. And in case the child before its commitment to the board for Louisville and Jefferson County Children's Home was a nonresident of the district in which the 'boarding home' is located, the boards of education may charge a reasonable fee per month for such child attending its schools, under section 4399-51.

The common schools of this commonwealth are state institutions. Boards of educations are administrative agencies of the state. The teachers thereof are employees of the state. The state pays to each common school district an annual per capita for each child residing therein eligible to attend the common schools. The chancellor's finding of law overlooks our Constitution and statutes appertaining to the common schools of the commonwealth. It deprives the children within the jurisdiction of the board for Louisville and Jefferson County Children's Home of the state's funds directed to be paid, and paid thereunder to the common school districts within and without the city. The requirements of sections 938b-10 and 938b-11 imposing the duties stated therein upon the board for Louisville and Jefferson County Children's Home, respecting the

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furnishing of education facilities and teaching of the inmates of the home elegible to attend the common schools, were not intended to, and do not deprive them of their absolute rights to free tuition while attending the common schools of the districts in which the board's institutions are located, or in which the 'boarding homes' are situated, so long as they remain in the home or in the 'boarding homes' in which the board for Louisville and Jefferson County Children's Home may place and maintain them.

Section 4399-51 is inapplicable to children so long as they reside in the school districts in which the institutions of the board for Louisville and Jefferson County Children's Home may be located or in the districts in which the 'boarding homes' may be located. There seems to be no statute authorizing the state's per capita for each child within the jurisdiction of the board eligible to attend the common schools of the county or city to be paid the board for Louisville and Jefferson County Children's Home. The common school district in which any institution of the board is located whereat the child is kept, or the district in which the 'boarding home' child is kept and maintained in pursuance to its authority, is entitled to include such child in the school census of such district, and to receive the state's per capita accordingly. It is the statutory duty of the city and county board of education to permit the child included in such census to have all the rights and privileges of the free common schools of the district. They are without right to charge and collect of the board for Louisville and Jefferson County Children's Home tuition for such child."

It seems to the Court that the Wirth case, involving the Louisville and Jefferson County Children's Home, better known as Ormsby Village, is a weaker case insofar as the plaintiff's contentions are concerned because of the fact that Ormsby Village is supported by taxation by both the City of Louisville and Jefferson County and is empowered under the Act and does actually provide educational facilities for its children; whereas the Kentucky

Children's Home, in the case at bar, there is no Act concerning its operation or is there any tax levied for its support. It derives its entire support from appropriations made by each legislature from time to time and any contributions that may be made to it by public spirited citizens. However, there is a strong point in its favor in which the point made by the plaintiffs, that in the case at bar the children are brought from all the counties in the State and placed in this home at Lyndon within the jurisdiction of Jefferson County, and therefore an added expense placed upon the Board of Education of Jefferson County to educate those children would be unfair because of the children who come from other counties than Jefferson; whereas in the case of Ormsby Village the children are all supposedly to be from Louisville and Jefferson County.

The point made by the plaintiffs, that it is unfair to place such a burden on the taxpayers of Jefferson County, seems to have been covered by the case of Crain *v.* Walker, decided February 22, 1928 by the Court of Appeals and reported in 222 Ky. 828. In that case the question was raised by an injunction suit filed by taxpayers residing in the common school district against its trustes in Hardin County and the Kentucky Baptist Children's Home. The Children's Home was housing 221 children within the public school age who had been gathered exclusively from various points within the Commonwealth of Kentucky, and it was sought to enjoin the defendants from carrying out an arrangement by which the trustees of the school district agreed to furnish and pay the salaries of three teachers in the primary grades and that the Home would provide the rooms and equip the rooms with necessary equipment for the teaching of such a school. It was charged in the petition, (1) that the inmates of the Home were not entitled to attend the schools of the districts because they were not residents therein (2) that the corporate defendant had no right to continue to bring into the district the orphaned inmates of the State and to demand or require for them the privilege of attending the public schools of the district, (3) that the arrangement was in direct violation of the provision of section 189 of the Constitution which provides that no portion of any fund or tax may be raised or levied for education

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purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.

We will discuss only the first two grounds as being appropriate to the question raised in this case. In reference to the first ground, the Court said:

"It is conceded that for the inmates of the home to be entitled to admission into the public schools within the district, they should be residents therein within the meaning of the statutes so prescribing. At the threshold it should be remembered that those whose residential status is involved are the orphaned inmates of the home, and who are the ones whose primary rights are to be affected by the solution of the question. There are a great number of relation- in life wherein the question of one's residence is involved, and what might be held sufficient to solve it in one case might be insufficient in another. The question is also sometimes affected by the class to which the one affected belongs; as, for instance, an adult, or one who is of sufficient age to choose his residence, may do so in a different manner than a mere infant, who, on account of his youth, is incapable of exercising volition in that respect. In the latter case the universal rule is that the residence of an infant of tender years follows that of his parents or the one who has the legal custody of him, or of one who stands in the relation of loco parentis to him.

In regard to the first part of the above statement, one set of facts may constitute residence for the purpose of entry into public schools, while a different state of facts might be required to render one a resident so as to entitle him to exercise his right of suffrage, and yet another state of facts would be required for the purposes of levying taxes on personal property, and still another for the purpose of conferring jurisdiction for the probate of wills. Hence, where volition enters into the question, it is the general rule that intention, followed by acts and conduct in conformity therewith, will usually fix the place of one's residence; but such fact seldom, if at all, enters into the inquiry

where the residence of an infant is involved. Moreover, the question of residence in a case like the one before us should not be confused with domicile, for it is a well-known principle of law that one may have a legal domicile at one place, and actually reside at another, with the intention of returning to his domicile when he ceases to reside at the other place. With these observations in mind, and keeping also in mind the purpose of the commonwealth in providing a free public school system so as that all children within its borders should have extended to them the opportunity of a limited free education, let us inquire what is the law with reference to a sufficient compliance with the statute to entitle a pupil within the free school age to attend a public school?

The text in 24 R. C. L. 624, par. 83, under the heading of 'What Constitutes School Residence', starts out with the general statement that:

'In determining whether a person is or is not a resident in a school district within the meaning of such a rule (the statutory one requiring it) the usual and ordinary indicia of residence or the absence thereof should be the proper guide'.

That text is supported by a reference in the note to the case of Board of Trustees of Stanford Graded School District *v.* Powell, 145 Ky. 93, 140 S. W. 67, 36 L. R. A. (N. S.) 341, Ann Cas. 1913B, 1016. The text then proceeds to say:

'Residence entitling an infant to school privileges is distinguished from domicile, or the technical and narrow use of the term 'residence', for the purpose of suffrage or other like purposes, and it is construed in a liberal sense as meaning to live in, or be an inhabitant of, a school district, the purpose being not to debar from school privileges any child of school age found within the district under the care, custody, or control of a resident thereof. Such rule does not usually require that there be a legal domicile, but it is sufficient if the child and its parent, or the person

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in loco parentis, are actually resident in the district, with apparently no present purpose of removal'.

Further on, the compiler refers to a few cases other courts holding that residence for school purposes is equivalent to domicile, and is to be supported by the same facts and the same legal principles. But the Powell case repudiates that doctrine, and expressly holds that 'for school purposes a child's residence is not necessarily that of its parent or parents,' and that, if it has assumed a permanent home with some other person standing in loco parentis to it, then the residence of the child for school purposes is the same as that of such person. The opinion in the Powell case distinguished it from the prior one of Board of Education of Winchester *v.* Foster, 116 Ky. 484, 76 S. W. 354, 25 Ky. Law Rep. 723, 3 Ann. Cas. 692, relied on by counsel for plaintiffs, by pointing out that the parents of the child in that case lived in a home that they owned, and which was located in another state, and that the father did not relinquish control over the child, nor did its uncle, who resided in Winchester, and to whom temporary custody was given, acquire any control over it, or assume any responsibility over his niece while she resided in his family. The Powell opinion also referred to the cases of Yale *v.* West Middle School District, 59 Conn. 489, 22A. 295, 13 L. R. A. 161, and People ex rel. Brooklyn Children's Aid Soc. *v.* Hendrickson, 54 Misc. Rep. 337, 104 N. Y. S. 122, in each of which the parents of the child, though non-residents of the state, delivered its custody to the resident of the school district, with the intention and purpose that it should permanently live and reside with that person who thereby occuppied the place of parent to the child, and whose residence thereafter became that of the child, so as to entitle it to the benefit of the public schools.''

According to the opinion in the above Crain *v.* Walker case the same argument was made in that case, that great hardship would be entailed on the taxpayers of the Glendale

Graded School District and the Court answered that by stating:

> "That may be so; but if so, relief must be obtained from the Legislature and not from the courts. The courts do not make our school law, nor do they determine the objects of taxation for school purposes".

They quoted with approval the case of Independent Order of Odd Fellows of West Virginia *v.* Education Board, etc. of Elkins, 90 W. Va. 8, 110 S. E. 440, 48 A. L. R. 1092. It also quoted with approval the case of Weller *v.* Muenninghoff, 155 Ky. 77, 159 S. W. 632, in which it tells that the inmates of the county almshouse, after their required time of occupancy, became residents of the voting precinct in which the institution was located, so as to entitle them to vote therein which, they say, requires a more technical and narrow use of the term "residence" than is required to establish it of the purpose of attending and reaping the benefit of public schools.

The claim is also made that the children in the Kentucky Children's Home are in the custody and keeping of the court and not in the custody of the Home; that the defendant, Goheen, as Superintendent of the Home, has immediate and personal charge of the children in said institution under the legal custody of the 119 or 120 county courts of the Commonwealth, and that those who stand in "loco parentis" to the said children and who are the "legal custodians of them" as the term is used in Section 258.120 or the State itself, and the County courts of the 119 or 120 counties of the children's residences and commitments, each of which courts has its own situs, residence and domicile in said respective 119 counties; that the children were not residents of Jefferson County at the time they were so committed by the various county courts of the counties, nor are any of them or any of their "parents" or "guardians" or "legal custodians" or "bona fide residents" of Jefferson County, so as to entitle them to force Jefferson County to train and educate them the same as Jefferson County trains and educates its own handicapped children in special schools. However, I fail to see the distinction between the children at the

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Kentucky Children's Home and those who are in the Kentucky Baptist Children's Home and, in fact, on the contrary, I see a similarity so striking that the rule laid down by the Court of Appeals in the Kentucky Baptist Children's Home case must be followed in this case.

Although the county courts and the State have supervision over these children so long as they remain in these homes, it never has been contended that the courts of the State occupies the position of a parent so as to be denominated in loco parentis. The definition of the term "loco parentis" is, in place of the parent, and the courts in the State, although they have supervision of the children they do not have the actual custody, as that is delegated to the superintendent of the home, who is the legal custodian of the children. It was held so in the Children's Home case and must be held in this case. The residence then of the Home becomes the residence of the child so long as it remains in the custody of the Home and fixes definitely the right of the child and of the Home to obtain the benefits of the educational facilities furnished by the County Board of Education. The claim made that such a rule is injurious and unfair to the citizens and taxpayers of Jefferson County, in that it casts a burden upon them to provide such facilities for the children of the Home, may be recognized by the court, but I fail to see how the court can remedy the situation, as that is a matter for the legislature and not the courts to remedy.

The claim made that the State furnishes educational facilities to handicapped children in the four institutions, namely, the School for the Blind, Deaf, Greendale, Feebleminded, and that such education is under the direction of the State Board of Education, does not relieve liability of the Jefferson County Board of Education to furnish such education in the event the State institution fails to do so. That seems to be required under Section 158.030, which defines common school, and Section 158.100, the compulsory education Act. Section 159.010 also requires the person having custody or charge of any child between the ages of seven and sixteen to send child to the school of the district in which the child resides, and other Acts provide penalties for failure to do

so. That being true, the defendant is under obligation to see that the children in his custody receive proper grade school education; and it seems to the Court that the Jefferson County Board of Education must furnish that education, as they receive a per capita tax on every child residing in the county, including those who are in the custody of the defendant.

Claim is made in this case that the children in the Kentucky Children's Home are delinquent and handicapped children, and yet I fail to agree with that, as there is nothing in the record to show that to be the case; but they are simply dependent children, orphaned for some reason or other, and not having any church affiliation are not eligible for admittance into various denominational orphans' homes. This being true, the Kentucky Children's Home would serve the same purpose, in Kentucky for the homes of children committed to them by the court, as the various denominational or church orphans' homes would serve to its constituency.

I have read the opinion of the Court of Appeals in the case of Board of Education, City of Corbin *v.* City of Corbin, and fail to see how it is in point with the case now before us, as that case involved the gift by the City of Corbin of $500.00 a month to the Board of Education of the Corbin School District. The Court held that was in violation of the constitutional provision which provides that no city, or division thereof, or incorporated district, shall appropriate money or loan its credit to any corporation, association or individual, except for certain purposes, none of which are involved in this case.

For the above reasons, the general demurrer to the petition is sustained.

LAWRENCE F. SPECKMAN,
Judge.

5/14/46.

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APPENDIX "D"

COURT OF APPEALS OF KENTUCKY

April 29, 1947

JEFFERSON COUNTY BOARD OF EDUCATION, WILLIAM DIEMER, Suing as Taxpayer, etc., *Appellants,*

vs.

LUTHER E. GOHEEN, Superintendent, Kentucky Children's Home, *Appellee.*

Appeal from Jefferson Circuit Court, Chancery Branch, First Division, Lawrence F. Speckman, Judge

Opinion of the Court by Judge Cammack

Affirming

The Jefferson County Board of Education and William Diemer, suing as a taxpayer and on behalf of the other taxpayers of the Jefferson County School District, instituted this Declaratory Judgment proceeding against Luther E. Goheen, Superintendent of the Kentucky Children's Home at Lyndon, Kentucky, to secure an adjudication of the rights of the parties relative to the furnishing of educational facilities for children committed to the Home. For many years prior to 1936 the Home was operated by the Kentucky Children's Home Society, a charitable organization. It was supported in part by private donations, by payments from the fiscal courts of various counties from which children had been committed to the Home and by appropriations from the Legislature. In the case of Speer *v.* Kentucky Children's Home, 278 Ky. 225, 128 S. W. 2d 558, a plan was approved whereby the Department of Welfare of the Commonwealth took over the Children's Home in accordance with the 1936 Reorganization Act. Prior to 1936, and since that time, the Jefferson County Board of Education has included the inmates of the Home, falling within the compulsory school age limits, in its enu-

meration of census pupils. Until recently it has been the custom for the Home to furnish building facilities and for the County Board of Education to furnish teachers. Children reaching the high school level have been sent to the Anchorage High School, the County Board paying their tuition. In recent years what appears to have been a very unsuccessful attempt was made to send some of the children in the upper grades to a county school at Lyndon. In most cases the children from the Home were older than were the county school children in the corresponding grades and all of them for some unfortunate reason had been taken from their respective homes and committed by court order to the Home. Furthermore, since it is the policy of the institution to place as many children as possible in suitable homes, there was a constant shifting of the pupils from the Home. It requires no stretch of imagination to visualize a very unsatisfactory situation in county schools where children from the Home were in attendance. We, however, can not concern ourselves with the wisdom of the education program which the Legislature has provided or has permitted to develop for the children committed to the Home. It has long been held in this jurisdiction that schools are state and not local institutions. City of Louisville *v.* Commonwealth, 134 Ky. 488, 121 S. W. 411. Indeed, section 183 of our Constitution provides that the General Assembly shall by appropriate legislation provide an efficient system of common schools throughout the state.

Society is becoming much more conscious of its obligation to the underprivileged. Whether this has come about through an enlarged humanitarian concept, or whether society's selfish instincts, looking toward self-preservation, have prompted this move, need not concern us. Within our own Commonwealth we have seen considerable progress along this line. Bowman *v.* Frost, Commissioner of Welfare, 289 Ky. 826, 158 S. W. 2d 945; Meredith, Attorney General, *v.* Ray, 292 Ky. 326, 166 S. W. 2d 437.

In a somewhat lengthy petition the appellants have made reference to plans now under consideration by the Department of Welfare for materially expanding the facilities of the Home. They allege that over a period of some 15 years the County Board of Education will be called upon to expend

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considerably in excess of a half million dollars for capital outlay and maintenance of a school program for the Home over and above the amounts which may be anticipated from the state per capita, which, incidentally, under KRS 157.040 can be paid only to school districts and not to another department of the state government or to a private institution. With the view of shifting the burden of maintaining an adequate school program for the children committed to the Home to the Department of Welfare, which is charged with the administration of the affairs of the Home, the County Board of Education instituted this proceeding.

A number of contentions are raised by the appellants in the 30 paragraphs of their petition, but they group them under two headings as follows:

> "(A) That, Inasmuch as the Legislature Has Not Attempted to Expressly Place on Jefferson County the Unfair and Oppressive Burden of the Expenses for Educating the Children Committed From Kentucky's Other 119 Counties, it Cannot be Implied, by Any Reasonable and Fair Legal Deduction, That Such an Unjust Treatment of Jefferson County Could Have Been the Legislative Intention.
>
> "(B) Even if Such a Fantastic Deduction as Set Out Above, Could by Any Specious Reasoning be Imagined to Have Been the Intention of the Legislature, Then Such an Attempt by the State to do so Unjust a Thing is Expressly Prohibited by the 14th Amendment to the Constitution of the United States, and by Nine Separate and Distinct Provisions of the Constitution of Kentucky."

We will dispose of the second proposition first. For reasons hereinafter set forth we deem it unnecessary to discuss the Federal and State constitutional questions raised by the appellants, because we do not think the program of education which the Legislature has authorized or has permitted to develop for the children in the Home runs afoul of either the Federal or State Constitutions.

At the outset, we may say it is our view that the Legislature should give immediate consideration to the develop-

ment of an adequate program of education for the children in the Home from funds appropriated to the Department of Welfare and administered by it. In a limited sense children committed to the Home are atypical rather than typical children. This does not mean that they are maladjusted or necessarily of low mentality. Because of social, economic or other circumstances peculiar to their homes, the local officials have seen fit to commit them to the Home for their own well-being.

The Legislature has provided reasonably adequate facilities for the education of the blind and deaf in institutions wisely placed under the control of the State Board of Education. These institutions are primarily educational institutions of a special type, and those committed to them are not to be classed with those committed to the Home. Incorrigibles and delinquents may be committed to the Houses of Reform which have been placed under the Department of Welfare. While special educational programs are carried on in the latter institutions from funds appropriated to the Department of Welfare, the primary function of those institutions is not educational, but rather corrective. They are attempting to rehabilitate those committed to their charge in order that they may assume the status of respectable citizens and contributing members of society. It follows, therefore, that we are not impressed with the argument that it would be just as logical for the Legislature to place the burden of educating those confined to the Houses of Reform, which are located in Fayette County, upon the Board of Education of that County as it is for the burden to be placed upon the Jefferson County Board of Education for the education of the children committed to the Home.

We can think of no legitimate argument against the appropriation of an adequate sum of money to set up a much needed program of education which, undoubtedly, would require many special features, for children in the Home over and above the amount furnished now to the Jefferson County Board of Education in the way of per capita.

By legislative enactment the City of Louisville and Jefferson County maintain an institution for children of the type committed to the Home. A number of these children are placed in institutions, Ormsby Village for the whites,

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and Ridge Crest for the colored, but the great majority of the 2250 children committed to the Board's care last year were placed in "boarding homes" and the like. We can think of no plausible argument for requiring the Jefferson County Board of Education to assume a financial burden over and above the amount it receives in the way of per capita for educating children committed to the Home from the other 119 counties in the State, but is this only and inequity or an unconstitutional provision? It is obvious from what has already been said that we think it is only an inequity. While we do not deem the point to be of controlling weight in this discussion, it is quite probable that many compensating economic factors could be brought to light because of the maintenance of an institution the size of the Home in rural Jefferson County.

It seems to us that the primary question involved relates to the residence of the children committed in the Home. The prayer of the appellants' petition follows:

> "Wherefore, Plaintiff Prays that this court decree that it is not the duty of plaintiff, the Jefferson County Board of Education, to expend any of its tax funds, raised from Jefferson County, to train and educate any of the wards and public charges of the State of Kentucky, or of the other 119 Counties of the State, which wards and charges are in custodia legis, or in the custody of the Court, temporarily detained in the State's Children's Home Institution in Lyndon, Kentucky; and plaintiffs pray for their costs herein expended and for all further proper and equitable relief."

The appellants take the position that the children confined in the Home are still in the custody of the courts which committed them thereto. We can not agree with this argument. While it is true that, under KRS 199.130 those courts may, upon a proper showing, make orders relating to the custody of the children committed to the institution by them, they do not stand in loco parentis to the children. When a child enters the Home he is in the custody of the superintendent thereof. It is the Home, through its offi-

cers, that stands in loco parentis to the child. The institution has full charge and custody of him and the Legislature has made it a duty of the Home, through its officials, to care for the child's well-being. It is the duty of the Home to place children in private homes and not that of the courts of the counties from which the children were committed. In a sense, the Home is a distributing center for dependent and neglected children.

So long as such children remain in the Home, it stands in loco parentis to them and they are residents of the school district in which the Home is located, namely the Jefferson County School District, and the Jefferson County Board of Education not only should but must include them in its enumeration of census pupils. The cases of Crain *v.* Walker, 222 Ky. 828, 2 S. W. 2d. 654; Wirth *v.* Board of Education for Jefferson County, 262 Ky. 291, 90 S. W. 2d. 62; and Board of Education of Louisville *v.* Board of Education for Jefferson County, 265 Ky. 447, 97 S. W. 2d. 11, support this statement. Certainly, children committed to the Home could not be included in the school census of the district where they originally resided. In the Crain Case it was held that children committed to a Baptist Orphans' Home located in the Glendale Graded School District in Hardin County were residents of that school district because the school stood in loco parentis to them. It was held that the school district should include the children in the Orphans' Home in its enumeration of census pupils and a plan was approved whereby the district furnished teachers for the pupils residing in the Orphans' Home; and also that this was not in violation of the constitutional provision prohibiting an appropriation for a sectarian school. Ky. Constitution, section 189. In the Wirth Case it was held that a child who had been committed to the Louisville and Jefferson County Children's Home and then placed in a "boarding home" located in the Jefferson County School District was a resident of that district and entitled to be included in the enumeration of census pupils for that district and to receive his education free of charge therein. The contention that the Children's Home should pay his tuition to the Jefferson County Board of Education was overthrown. The

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reason for the ruling was that the person with whom the child had been placed stood in loco parentis to him. What was contended to be dictum relative to the residence of the child in the Wirth Case was adopted as the ruling of the court, or "stictum," on the question in the case of Board of Education of Louisville *v.* Board of Education of Jefferson County, supra.

For the reasons given we think the judgment should be and it is affirmed.

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No. 745. JEFFERSON COUNTY BOARD OF EDUCATION ET AL. *v.* EVERETT, SUPERINTENDENT. Appeal from the Court of Appeals of Kentucky. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Henry M. Johnson* for appellants. Reported below: 306 Ky. 439, 207 S. W. 2d 567.